United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11388

WELLS, INC., a corporation, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

AND

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

WELLS, INC., a corporation, RESPONDENT

BRIEF OF PETITIONER, WELLS, INC., A CORPORATION

LOUIS H. CALLISTER
Attorney for Petitioner.

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STATEMENT OF THE CASE

This case is one to review the final order of the National Labor Relations Board dated the 12th day of June, 1946, in the case before the board, entitled "In the Matter of Wells, Inc. and International Association of Machinists," being the board's case No. 20-C-1306. The proceeding here sought to be reviewed was one instituted by the National Labor Relations Board against this petitioner, whereby petitioner was charged with having engaged in, and was engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, Section 8 (1), (3), and (5) and Section 2 (6) and (7), 49 Statute 449. The complaint was issued out of Twentieth Region on the 24th day of August, 1945, and a hearing was had before Trial Examiner, Howard Myers, at

Reno, Nevada on the 24th and 25th days of August, 1945. Examiner Myers rendered his Intermediate Report on the 17th day of October, 1945, to which this petitioner duly filed and served its exceptions. The board's decision and order was rendered and made on the 12th day of June, 1946 (tr. 21); however, Gerald D. Reilly, a board member, dissenting, in which he stated that he could not accept the conclusion of the majority of the board, that this petitioner had discharged their foreman, Benton, because of its (petitioner's) desire to discourage union membership and activities of its rank and file employees, and that the discharge was violative of Section 8 (3) of the National Labor Relations Act (tr. 32).

The decision and order of the board provided that this petitioner:

1. Cease and desist from:

(a) Discouraging membership in International Association of Machinists, or any other labor organization, by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment;

(b) Threatening employees with economic reprisal because of their activities on behalf of the above-named or any other labor organization;

(c) Interrogating employees concerning their membership or other activities in or on behalf of the above-named or any other labor organization;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Jack Benton immediate and full reinstatement to his former or a substantially equivalent posi-

tion without prejudice to his seniority or other rights and privileges;

(b) Make whole Jack Benton for any loss of earnings he may have suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings during such period;

(d) Post at its plant at Reno, Nevada, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicious places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

It was ordered further that the complaint be dismissed insofar as it is alleged that the respondent refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in an appropriate unit (Tr. 29, 30 and 31). It will be noted that the board ordered that the complaint be dismissed insofar as it alleged that this petitioner had refused to bargain collectively with the union as the exclusive bargaining representative of its employees in an appropriate unit.

This petitioner, Wells, Inc., a corporation, filed its petition for review (Tr. 323) on the 18th day of July, 1946. The National Labor Relations Board filed its answer and petitioned for review of its order and requested enforcement of said order (Tr. 334) on the 10th day of September, 1946. Subsequent thereto, this petitioner filed its answer and reply to board's petition for order of enforcement (Tr.

342) on the 30th day of September, 1946.

The so-called unfair labor practices in which it is alleged in the proceeding before the National Labor Relations Board, that petitioner had engaged, all occurred in Reno, State of Nevada, which is within the jurisdiction of this Honorable Court.

The facts out of which this controversy arose are as follows:

This petitioner is a Nevada corporation and is now, and has been during the period involved in this case, engaged in transportation of freight between the States of Nevada and California. That its principal office and place of business is at Reno, State of Nevada. The International Association of Machinists, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of this petitioner. The type of work at its Reno Shop was the complete repair work on its trucks and transportation, which included welding, greasing and servicing (Tr. 83 and 84).

Jack Benton, the person whom the Board provided in this order should be reinstated to his former position, was first employed by this petitioner on the 17th day of August, 1942, at its shop at Reno, Nevada. About the middle of April 1943, he was promoted to foreman (Tr. 82). It was stipulated by the Board and this petitioner that the foreman, Benton, had the right to hire and fire, that he actually did so; that he also supervised and directed the activities not only of mechanics, but that of grease men and tire men (Tr. 83). Foreman Benton was one of the most active members of the Union (Machinists). He was one of its trustees and the shop steward (shop steward duties consisted of taking care of trouble for the union with the management, Tr. 216. It was also his duty as shop steward to know which of the employees were and which were not members of the union, Tr. 213) at the shop of this respondent at Reno (Tr. 193). The foreman, Benton, also solicited members for the union in the shop among the employees of respondent (Tr. 216).

The complaint filed in this cause (Tr. 3, 4 and 5) by the board provided in paragraph four of said complaint, that the unit for the purposes of collective bargaining was

as follows:

> "All mechanics, mechanic helpers and *greasers* employed by the respondent at its shop in Reno, Nevada, constitute a unit appropriate for the purposes of collective bargaining." (Italics ours.)

At the trial it was stipulated that the unit would include only mechanics; this action excluded greasers from the unit. (Tr. 87.)

Exhibit I (Tr. 318) shows that the Union (Machinists) and foreman, Benton, solicited and obtained signatures of greasers, namely, D. A. Johnson and R. Mudge. Both Exhibit II (Tr. 304) and Exhibit IV (Tr. 307) show these two men to be greasers.

This petitioner had agreements at that time with other labor organizations not only as to its operation at Reno, but at its Luning, Nevada shops. Its contract with the Teamsters at Luning included grease men (Tr. 266). This company also had a contract with the Teamsters at Reno, covering line drivers (Tr. 258). The teamsters representative at Reno, Harry Andersen, told J. W. Wells, President of the petitioner, that the Teamsters Union had jurisdiction of grease monkeys (grease men), tire men and parts men (Tr. 238 and 239). Mr. Andersen further advised Mr. Wells (Tr. 239) that the men (washers, hostlers, tire men, greasers and parts men) belonged to him and that he would represent them; also, that the petitioner, Wells, Inc., would get into trouble if they negotiated with the Machinists with respect to these employees. Wells testified (Tr. 238) that he was afraid of a jurisdictional dispute in view of the fact that Andersen (Teamsters representative at Reno) and McShane (representative of Machinists) both claimed that they represented some of the same men, that is, greasers.

An affiliate of the petitioner, Wells Cargo, Inc., which had the same officers as this petitioner and who operated at Las Vegas, Nevada, had entered into an agreement with this same union, that is, the machinists; as a matter of fact, with the same officers who were representing the machinists in the controversy involved herein (Tr. 157). This contract was entered into on the 16th day of May, 1944 (Tr. 157). The contract at Las Vegas was entered into on the date of

the first meeting with Mr. Wells and the machinists, in which the Wells operation at Reno was discussed. He was at this time asked to negotiate for the Reno employees at this meeting, the date being May 16, 1944. A copy of the agreement entered into with Wells Cargo, Inc., an affiliate of this petitioner, is found in Tr. 310, known as Exhibit VI. This is a very favorable contract when viewed in the light of advantages to the union. For illustration, Section D of Article I, which is found in Tr. 311, provides that new employees shall be secured through the union. Then, if the union is unable to furnish competent men within 96 hours, the company may secure them from other sources, provided they obtain a work clearance from the union before going to work, and that they must then comply with the union requirements within fifteen (15) days after going to work. It further provided that any employee should have the right to appeal his discharge or lay-off through the Grievance Procedure.

Although Benton was shop steward, trustee of the union and assisted in securing members for the union among employees of this petitioner, he was expressly excluded from the unit for the purposes of collective bargaining both by the board and petitioner, for the reason that he was a foreman with the power to hire and fire (Tr. 191). The board stipulated with this petitioner that he should not be part of the unit for these reasons (Tr. 191). The evidence in this case clearly showed that his activities in matters of unionism were well known to this petitioner. The board so found (Tr. 25).

On January 31, 1945, Benton was discharged by this petitioner (Tr. 211).

The decision and order of the board (Tr. 21) does not set out all of the facts pertinent to the issues involved herein, and for that reason we have attempted to set out facts to fully acquaint this Honorable Court with the circumstances surrounding this controversy.

The Board found (Tr. 25) that this petitioner, through its officials, "prevented the union from collecting union dues in the shop during non-working time; questioned employees concerning their union membership and activities, made disparaging remarks concerning the union (of rank

and file employees); threatened to remove its operations to Salt Lake City rather than submit to any of the demands of the union in the proposed contract; and finally engaged in dilatory tactics during the collective bargaining negotiations."

We feel that in order to properly apprize this Honorable Court with the actual evidence with regard to the statement and findings of the board, we should set out verbatum the actual evidence with reference to these findings.

The evidence consists of certain conversations which we set forth hereafter.

One of the conversations had between the foreman, Benton, with Bob Wells, Reno Manager, at the Reno shop was in the month of September or October, 1944 (Tr. 206). Benton was asked if any one was present within hearing, and he answered, "No, I would say they were, but propably they never paid no attention." Bob Wells at that time asked him what was the yellow thing on his sweater. Bob Wells also stated, "Did a bird fly over you?" Benton replied, "No, it's a Union button, the men wear them." No further remarks were made at that time (Tr. 206). Apparently no one heard, or according to Benton, probably no one paid any attention.

Around December 1944, George McKay, one of the Union Machinists' representatives, came to the shop at Reno to collect dues. Bob Wells told him not to come into the shop and bother the men (Tr. 207).

Foreman Benton stated to Bob, "We are not working. He come in here to collect dues from the boys." Benton further said, "I don't see why he can't come in here any time he wants to collect dues. The Teamster boss comes in any time he wants to and talks for a long period of time." He was asked whether he observed, during his employment. other representatives of any other labor organizations come into the shop and talk to the men. He answered yes, that Mr. Andersen of the Teamsters did. He was asked whom he visited with when he came, and he stated that he visited with Reisbeck thirty-five or forty minutes at a time. (Reisbeck is a foreman as shown on the payroll of the company Tr. 307). Foreman Benton did not know whether or not

they (referring to the Teamsters' representative, Mr. Andersen and others) were ever asked to keep out of the premises. He stated he did not know. Benton further stated, "They used to come into the office into the shop (referring to Andersen). He further stated there were no objections to Andersen being in the office (Tr. 207-8)." It must be remembered that the Teamsters had a contract with the company at Luning, Nevada as well as Reno and, of course, would have a right to discuss business matters with the foremen as well as the management.

Some time in September or October, 1944, foreman Benton had a further conservation with Bob Wells at the shop at Reno (Tr. 204). He was asking who was present and he replied, "I don't know, the bunch eating dinner, Blackie Ellis." He also answered, "The day crew, Melvin Jakomiet." He was asked whether Bob Wells' remarks were audible to everyone in the group. Benton replied he supposed they were. He further stated that if the men wanted to hear they could have done so. He stated that they were talking of Unions and Bob Wells said Unions were lousy, that Unions would keep a good man down and promote a sorry man. He stated that they argued about it, but that it was not a heated argument. It was a friendly argument (Tr. 204). Further, Bob Wells stated he claimed that any time a company that was working men couldn't fire a man without being told by the Union what to do, then it was a hell of a place to work. He was asked whether he made any remarks, and Benton replied, "Well, sure, I stuck up for the Union." Benton stated that he remarked that he thought Union was a good thing if it was lived up to (Tr. 205). Benton further stated that he wore a Union button about sixty-five per cent of the time.

During the time of these conversations, Benton was foreman, with the power to hire, fire, direct and supervise the men. R. C. Wells was Reno Manager (Tr. 306).

It will be seen that all of these conversations were not with the men individually, but only concerned foreman, Jack Benton, and the Reno Manager, R. C. Wells.

The Board found (Tr. 25), as set forth herein, that this petitioner threatened to remove its operation to Salt

Lake City rather than to submit to any of the demands of the union. We must look at all of the conversation of McShane, and not just one statement. Nothing was said in front of employees. It is true (Tr. 169) that McShane stated that before he (Wells) would submit to any of the conditions that the union asked, he would move his operation to Salt Lake City; however; McShane further stated (Tr. 152) that when he presented the proposed contract to Joe Wells, he stated, "He (Wells) started at the first of the agreement, and paragraph after paragraph, as we went down he said, 'these are O.K.', until we came to the overtime provision." They further had a discussion in respect to overtime over eight hours. McShane further testified that in his conversation with Joe Wells that with reference to wages, that the wages paid in Las Vegas, which the union was asking, were prohibitive on this operation (referring to Reno). Wells stated that he could not pay the same wages at Reno that he was paying at Las Vegas (Tr. 146).

The Board further found that this petitioner engaged in dilatory tactics during collective bargaining negotiations (Tr. 25); however, it concluded that it could not agree with the finding of the Trial Examiner that the union represented a majority and, accordingly, must dismiss the allegation of the complaint that this petitioner violated Section 8 (5) of the Act. That is, it found that this petitioner had not committed an unfair labor practice in violation of Section 8 (5) by refusal to bargain with the union (Tr. 27).

The Board's further finding (Tr. 28) that the record in this case shows that at the time authorization cards were procured by the union, foreman Benton, who was in charge of the respondent's shop at Reno, with the authority to hire and discharge, was actively engaged in union activities as a steward and trustee, and influenced some of his subordinates to become members of the union. It found that since the unions majority was procured with the direct and open assistance of a supervisory employee (Jack Benton), it could not be said that the union represented the free and untrammeled will of the employees and hence cannot be recognized as the representative of the majority.

What constituted the appropriate unit was raised by the petitioner (Tr. 168). The union contended Benton was

a mechanic and that only some of his duties were of a supervisory nature and that he should be excluded from the union as this petitioner insisted.

Notwithstanding all these facts, the union at no time petitioned for certification as provided by the National Labor Relations Act.

The Board found that Wells, Inc., had engaged in dilatory tactics during collective bargaining negotiations (Tr. 25), and yet (Tr. 27) dismissed allegation of complaint that Wells, Inc. had violated Section 8 (5) of the Act. (Refusal to bargain in good faith).

SPECIFICATION OF THE POINTS RELIED UPON

The points on which petitioner intends to rely are the following:

(1) That the National Labor Relations Board erred in finding that the petitioner, by the discharge of the foreman, Benton, discouraged membership in the rank and file of the union in violation of Section 8 (3) of the National Labor Relations Act.

(2) That the National Labor Relations Board erred in finding that the petitioner discriminated as to the hire and tenure of Foreman Benton's employment, and thereby, by virtue of said discharge, discouraged membership in the rank and file of the union employees.

(3) That it erred in directing this petitioner to offer Jack Benton immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges.

(4) That the National Labor Relations Board erred in directing the petitioner to make whole Jack Benton for any loss of earnings he may have suffered by reason of the petitioner's alleged discrimination against him, by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of the petitioner's offer of reinstatement, less his net earning during such period.

(5) That the National Labor Relations Board erred in finding that the petitioner interfered with, restrained and

coerced its employees and did certain acts in violation of the rights guaranteed in Section 7 of the National Labor Relations Act.

(6) That the National Labor Relations Board erred in finding that the petitioner had engaged and is engaging in unfair labor practices within the meaning of Section 8, paragraph one, of the National Labor Relations Act.

The National Labor Relations Act hereinabove referred to is the act of July 5, 1935, C. 372; 49 Stat. 449; 29 USCA, paragraph 151-166.

ARGUMENT

I.
Point

That the National Labor Relations Board erred in finding that the petitioner, by the discharge of the foreman, Benton, discouraged membership in the rank and file of the union in violation of Section 8 (3) of the National Labor Relations Act.

II.
Point

That the National Labor Relations Board erred in finding that the petitioner discriminated as to the hire and tenure of foreman, Benton's, employment, and thereby, by virtue of said discharge, discouraged membership in the rank and file of the union employees.

We shall address our argument to the two points hereinabove set forth because they involve the same facts and circumstances.

It is the position of this petitioner that it cannot reasonably be inferred from the circumstances of the discharge of Foreman Benton that such discharge discouraged membership in the rank and file union.

It is further the position of this petitioner that it did not discriminate as to the hire and tenure of Foreman Benton's employment. Where an employer finds that an employee is engaged in activities prohibited by the National Labor Relations Act, thereby subjecting the employer to

violation of the provisions of the Act, it is the duty of the employer to immediately terminate such activities.

The petitioner, in respect to the discharge of Benton, found itself in the position of having one of its representatives of management, the trustee for the local union involved; the shop steward of the union, that is the representative of the union in its place of business, to look out for and represent the interests of the union; his further duties as shop steward being to determine which employees belonged to the union and those who did not. It further found itself with its representative (Benton) securing union members among the rank and file of the employees whom he supervised, discharged and employed. The Board found (Tr. 29) that the union's majority was procured with the direct and open assistance of Benton and, therefore, it could not be said that the union represented the free and untrammeled will of the employees and they, therefore, refused to recognize the union as representing the majority of the employees in the appropriate unit for the purposes of collective bargaining.

Therefore, there can be no question that Benton was doing things prohibited by the National Labor Relations Act. Further, the employer was cognizant of this situation.

Where an employer is bound to terminate such acts, can it be said that the law gives the Board the power and right to determine how such activities must be terminated?

Since Benton's activities constituted interference with the free choice of petitioner's employees, this petitioner was bound to terminate Benton's activities in behalf of the rank and file union in any manner it deemed appropriate, nor was there anything optional about this conduct. This petitioner was under an affirmative duty to terminate coercive activities of interference with its employees' freedom and self organization, and this is exactly what the petitioner did. Such being the case, the petitioner's motives for terminating Benton's unlawful activities become entirely irrelevant so long as the employer was doing only what the act commanded him to do, that is, to refrain from coercing his employees in the exercise of their right to self organization, either directly or through his agents, the acts and motivation for his conduct is beside the point.

It seems to us that when an employer is confronted with a similar set of circumstances and facts as in this case, regarding Benton's activities, that regardless of what he does or says, the Board could say that the discharge was to discourage membership in the union of its rank and file employees, such as the Board found in this case. If the employer told the foreman he was discharged because he was sponsoring and fostering a union among the rank and file employees, could this not be said to be a warning to all employees of the danger attached to adherence to the union? The Board in substance found in this case, (Tr. 26-27) that the discharge of Benton was a warning to all employees of the danger attached to adherence to the union and, therefore, discouraged union membership. If the finding of the Board in this case with respect to Benton's discharge is upheld, then it is going to be extremely difficult, if not impossible, for an employer to avoid violating the National Labor Relations Act in his actions in terminating the activities of a foreman engaged such as Benton.

If this board sustains the finding of the Board with respect to Benton, the petitioner must reinstate him to his former position, of foreman (managements representative). Supposing Benton, and it is very probable that he will, continues to carry on as he did prior to his discharge, what can this employer do? It is confronted with the fact that the Teamsters claim jurisdiction of certain of the men that Benton has recently helped organize into the Machinists Union. If it does not discharge Benton and if he continues his activities, it is subject to the filing of unfair labor charges by other unions. If it immediately discharges Benton, then it can be found again that the motive for the discharge was to discourage union activity and as a warning to other employees of the danger attached to adherence to the union. How can an employee act in a dual capacity, that is, management's and union's representative, such as the Board is requesting in this case? We call attention to this Honorable Court that the decision in this case by the Board was not unanimous. That Gerald D. Reilly, a Board Member, wrote a very strong dissent (Tr. 32).

That Benton's discharge was not intended to discourage membership in the rank and file Union appears

from the uncontroverted evidence showing that another foreman, who had authority to hire and discharge and who was a member of the same Union, was not discriminated against (Tr. 94, 116, 319, Exhibit 2 (f), Tr. 332, 234, 32).

Also, Benton's successor, at the time of his promotion to Benton's position, was a member of the same Union and his membership in the Union must have been known to the respondent (Tr. 128, 224, 32).

The petitioner's hostility towards the Union, as shown by anti-union statements of its officials, also cannot provide a reasonable basis for the inference drawn by the majority of the Board (Tr. 25). It was not so strong as to prevent them from entering into a collective bargaining agreement with the Union for the petitioner's Luning division (Tr. 266). The same officials entered into another collective bargaining agreement with the Union in behalf of one of the petitioner's affiliates, Wells Cargo (Tr. 157). The petitioner also operated its Reno division, which is involved in this proceeding, under a collective bargaining agreement with the Teamsters' Union covering its line drivers (Tr. 258).

Nor do we believe that the circumstance that Benton received no warning not to engage in his unlawful activities or that he was denied his request for demotion, or was not permitted to remain in his position at a normal salary, betrays an intent to discourage membership in the rank and file Union. What it might indicate is that the petitioner intended to discourage any activities in behalf of the rank and file Union by another foreman. But even assuming that indirectly Benton's discharge might have discouraged union membership and activities by removing from its rank its most active member and also by discouraging membership in the Union by foremen, it still does not follow that the respondent could not terminate Benton's activities by discharging him, for, as it will be shown, they were activities proscribed by the Act.

While the record does not support the conclusion of the majority of the Board that Foreman Benton's discharge was due to discriminatory reasons, it furnishes ample support for the conclusion that, under the circumstances

disclosed by the record, Benton's activities in behalf of the rank and file Union were activities proscribed by the Act, and that his discharge, therefore, was not violative of the Act.

Since April 1943, and until his discharge on January 31, 1945, Benton was employed by the petitioner as foreman in charge of its Reno shop (Tr. 82). As such foreman, Benton directed and assigned work of "every man . . . in the shop." At the hearing, the parties stipulated that Benton had authority to hire and discharge his subordinates (Tr. 83), that he had exercised that authority and excluded him from the bargaining unit. Of his union membership and activities the record discloses that Benton joined the Union in October 1943 and did not relinquish his membership in the Union upon his promotion to the position of foreman. At the time of his discharge, Benton was one of the trustees of the union local and the union shop steward. He openly wore his union button at work most of the time (Tr. 216). Benton also admitted that he talked to his subordinates about the Union and asked some of them to join the Union (Tr. 318), and that he didn't ask the other employees to join because they didn't have the money to join. Finally, Benton, was one of the first to sign the employees' petition of December 18, 1944, designating the Union as their bargaining representative (Tr. 319).

That Benton's activities in behalf of the rank and file Union are proscribed by the Act is clear. They had a tendency to coerce the rank and file employees under his supervision in the exercise of their rights to self-organization. As a management representative, Benton possessed a power to hire, promote, discharge, or alter the terms and conditions of their employment. Conscious of that power, these employees would normally be reluctant to refuse his suggestions to join the Union. Since Benton's activities constituted interference with the free choice of the petitioner's employees, the petitioner was bound to terminate Benton's activities in behalf of the rank and file union in any manner it deemed appropriate.

The Act imposes upon an employer a duty to refrain from interference in, or domination of labor organization of its employees, and the Board has since the beginning of

the enforcement of the Act, imputed to the employers the responsibility for acts violative of this duty committed by supervisors. Such a "company policy" the Board has therefore found to be inherent in every employer's labor policy, requiring no promulgation, publication or explanation.

It is for this reason that Foreman Benton must have presumed to know that his activities in behalf of the rank and file union were unlawful, jeopardized the neutrality of his employer and were in violation of his duties to the employer. No warning, therefore, was necessary to put Benton on notice that his conduct was both unlawful and disloyal to his employer.

Moreover, the petitioner could have terminated Benton's activities in behalf of the rank and file union by discharging him also because they compromised its neutrality. The record shows that there was a jurisdictional dispute between the Union and its rival, the Teamsters' Union, both of whom claimed jurisdiction over the petitioner's employees in certain classifications and that the petitioner was informed by a representative of the Teamsters' Union that the petitioner "will get into trouble if (it) negotiated with the Machinists . . . (in behalf of the disputed classifications)."

Since Benton has engaged in activities in behalf of the rank and file union in his capacity as a management representative, and since his activities were not protected by the Act, it would seem reasonable that the petitioner was at liberty to take any steps for the protection of its neutrality it alone deemed appropriate. It would seem that to scrutinize the employer's conduct for the purpose of finding out whether the measures taken upon the preservation of his neutrality were or were not "appropriate measures" would be unjustifiable and constitute an unwarranted encroachment upon the prerogative of the management.

The majority of the Board rejected the petitioner's explanation for Benton's discharge and imputed to the petitioner, a discriminative motive in discharging Benton. Counsel for the petitioner during the oral argument advised President Wells, before Benton's discharge, to remain in

its employ would have compromised its neutrality and caused it to be liable for unfair labor practices (Tr. 290).

We certainly cannot concede that it is the duty of the employer under all circumstances to disclose to the discharged employee the reason for his discharge.

Can it be said that an employer under all circumstances must disclose to the employee all the reasons for the discharge? We certainly think not.

Under broad implications of the decision reached by the majority of the Board, the principle of imputation to the employer of responsibility for the acts and statements of supervisory employees cannot longer prevail, if foremen are free to engage in activities in behalf of a rank and file union. By protecting the supervisory employees, who have authority to hire, discharge, and otherwise affect the tenure and conditions of employment, in their activities in behalf of the rank and file union, the majority of the Board has also impaired the basic principle, essential for the preservation of employees' freedom to join a labor organization or select their bargaining representative of their choice.

The Court held in the case of *National Labor Relations Board* v. *Walt Disney Productions,* 146 Fed. (9th Circuit) (2d) 44, in substance, that although the purpose and affect of a discriminatory discharge need not be shown by positive evidence, nevertheless there must be evidence upon which it could be reasonably inferred from the circumstances of the discharge that there was discouragement as to union membership.

There is no evidence whatsoever in this record from which it could be reasonably inferred, that the discharge of Benton in any way discouraged union membership or activities.

This petitioner, as an employer, committed an unfair labor practice by virtue of permitting Benton to continue as far as he did in helping the union procure a majority of the rank and file employees. The Board found that since the union majority was procured with the direct and open assistance of Benton, that it could not be said that the union represented the free and untrammeled will of the

employees, and hence, the union could not be recognized as representing the majority (Tr. 29). The Board disregarded and refused to accept the explanation of the discharge of the petitioner (Tr. 23).

There is no question that this company is responsible for the words or deed of Benton.

> National Labor Relation Board v. Link-Belt Co., et al, 1941, 61 S. Ct. 358, 311 U. S. 584, 85 L. Ed. 368, 61 S. Ct. 31, 32, 311 U. S. 629, 85 L. Ed. 400.

It is well settled that the act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them.

> National Labor Relations Board v. Blue Bell Globe Manufacturing Company, 120 Fed. (2d) 974.
> National Labor Relations Board v. James Laughlin Steel Corporation, 301 U. S. 1, 57 S. Ct. 615, 628, 81 L. Ed. 893, 108 A. L. R. 1352.

When a just ground of discharge appears, it is ordinarily a mere matter of speculation to say that the discharge was because of union membership, supra.

When an employer is bound by law to terminate activities of a representative of the management which are unlawful under the act, it would be a mere matter of speculation to say what the purpose was, and the effect of such discharge. The employer in this instance was duty bound to terminate such activities of Benton, and to attempt to determine what effect his discharge had would be pure speculation. If the law is otherwise, then any employer, when it is his duty to terminate the unlawful activities of its foreman is subject to having the Board find that the effect of such discharge discouraged union membership or activities.

III.
Point

That it erred in directing this petitioner to offer Jack Benton immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges.

IV.

Point

That the National Labor Relations Board erred in directing the petitioner to make whole Jack Benton for any loss of earnings he may have suffered by reason of the petitioner's alleged discrimination against him, by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of the petitioner's offer of reinstatement, less his net earnings during such period.

We shall address our argument to both points three and four because our argument is similar to both points.

The purpose of an order to offer reinstatement of a discharged employee is not only to restore the victim of reinstatement to the position from which he was unlawfully excluded, but also and more significantly to dissipate the deeply coercive effects upon other employees who may desire self organization, but have been discouraged therefrom by the threat to them implicit in the discrimination.

The evidence shows to the contrary. The Board found that the union majority was procured with the open and direct assistance of Benton, management's representative, and, therefore, it could not be said that the union represented the free and untrammeled will of the employees (Tr. 29).

This petitioner recognizes that the Board has the power to determine the manner in which unfair labor practices may be expunged; however, the manners elected to expunge such unfair labor practices must be reasonable and fairly adapted to the situation.

> Utah Copper Company v. National Labor Relations Board, 139 Fed. (2d) 788.

It is the petitioner's further contention that the Board in its findings has disregarded the continued good faith activities of this company in its dealing with unions in the past. The records disclose the fact that it had entered into a contract by its affiliate, Wells Cargo, with this same union, that is the Machinists Union; that no difficulty was encountered regarding that contract or negotiations.

The fact that findings of the Board as to the facts if supported by evidence shall be conclusive, does not compel the Court to accept such findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence.

> National Labor Relations Board v. Union Pacific Stages, Ninth Circuit, 99 Fed. (2d) 153.

The National Labor Relations Board Act was not intended to empower the National Labor Relations Board to substitute its judgment for that of the employer in the conduct of its business; further, it did not deprive the employer of his right to select or dismiss his employees for any cause except where the employee was actually discriminated against because of his union activities or affiliation, supra.

It cannot be inferred from the evidence that any employee has been discouraged in union membership or activities.

The functions of the National Labor Relations Board are to secure the employees their rights under the National Labor Relations Board and remove effects of any unlawful conduct by an employer; and the act being remedial, the Board may take such affirmative action as will insure to employees their rights guaranteed by the Act.

> National Labor Relations Board v. Continental Oil Company, 121 Fed. (2d) 120.

One of the purposes of the act is to stop abuses that interfere with the right of the employee of self organization.

> Phelps-Dodge v. National Labor Relations Board, 61 S. Ct. 845, 849, 85 L. Ed. ;....., also supra.

A Board Order directing the reinstatement with back pay of an allegedly discriminatory discharge will not be enforced where the order is based on nothing more than speculation and conjecture, supra.

How could it be said that reinstatement of Jack Benton to his former position of management's representative under the circumstances in this case effectuates the policies of the National Labor Relations Act?

We are in substance asked to reinstate the trustee and shop steward of the union, who has subjected this company to a violation of the National Labor Relations Act by virtue of his conduct as found by the Board. As we have heretofore stated, the Board disregarded the union claim of majority because of the open assistance and help of Benton (management's representative).

We shudder to think of the untenable position in which this petitioner will find itself if it is compelled to reinstate Benton to his former position as management's representative. If he continued any of his former activities as shop steward and trustee of the union, and there are no assurances he won't, this petitioner would be powerless to terminate such activities without being subjected to a claim that the effect and purpose of terminating these unlawful activities was to discourage union membership and activities.

It connot be said that to effecutuate the policies of the National Labor Relations Act it is necessary to reinstate Jack Benton. It seems to us that the effect of such reinstatement would give the stamp of approval of Benton's activities in interfering with the free and untrammeled rights of the employees to belong to any labor organization which they may desire to choose.

If the petitioner is forced to reinstate Benton and he continues his unlawful activities, a jurisdictional dispute is almost certain to result. This petitioner would then find itself in the untenable position where it would be afraid to terminate the activities of Benton; and, therefore, by not terminating such activities, it would be subject to a finding of the Board that it is responsible for Benton's activities, as management's representative, and, therefore, subject to another charge of unfair labor practices.

V.
Point

That the National Labor Relations Board erred in finding that the petitioner interfered with, restrained and coerced its employees and did certain acts in violation of the rights guaranteed in Section 7 of the National Labor Relations Act.

VI.

Point

That the National Labor Relations Board erred in finding that the petitioner had engaged and is engaging in unfair labor practices within the meaning of Section 8, paragraph one, of the National Labor Relations Act.

We shall address ourselves to the two above named points because the facts surrounding the subject matter is the same.

The Board found: (Tr. 25)

> "Through its officials, the petitioner prevented the union representative from collecting union dues in the shop during non-working time; questioned employees concerning their union membership and activities, made disparaging remarks concerning the Union in the presence of rank and file employees; threatened to remove its operations to Salt Lake City rather than to submit to any of the demands of the Union in the proposed contract; and finally, engaged in dilatory tactics during the collective bargaining negotiations."

On pages 7-8-9 of this brief, we have set forth in detail the conversations which the Board relies upon in making some of its findings as hereinabove quoted.

It will be noted that in these conversations none of the rank and file employees participated. It is true that they may have overheard parts or all of the conversation. Benton was the principal actor in these conversations and was management's representative. As we have said before, the Board held that because of Benton's activities, the free and untrammeled will of the rank and file employees was interfered with by virtue of his activities on behalf of the Machinist's Union (Tr. 29). The conversations that are referred to by the Board in making its findings set forth above actually amounted to a difference of opinion between two of the petitioner's supervisory employees, one employee taking one position, and the other another position.

Benton (Tr. 204) stated that in one conversation with Bob Wells, that he stuck up for the union. Further, that

he (Benton) remarked that he thought the union was a good thing if it was lived up to. We find in this instance a supervisor whose actions could be attributed to the employer, taking the opposite position of Bob Wells. The rank and file employees involved in this case were under the direct supervision of Benton. It would seem reasonable that they would fear Benton more in respect to exercising their rights under the Act than they would Bob Wells.

In determining whether statements by supervisory employees constituted interference, restraint or coercion as unfair labor practices, reviewing court must decide whether it could reasonably be concluded that the statements interfered with, restrained or coerced employees in the exercise of their statutory rights.

> National Labor Relations Board v. Pacific Gas & Electric Co., (Ninth Circuit) 118 Fed. (2d) 780.

Could it be said that the arguments of Benton and Bob Wells, in which Benton stuck up for the union and Wells expressed his opinion in regard to unions, were such statements that they interfered with, restrained or coerced the employees in the exercise of their statutory rights?

It is certainly inconsistent to find that Benton's actions interfered with the free and untrammeled will of the employees (Tr. 29); that is, that the actions of Benton, because of his procuring union membership, interfered with the employees' rights; then for the Board to find that Bob Wells' statements (Tr. 25) had discouraged union membership; or had made the men fearful of reprisals.

The courts have held that the findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive; however, this does not compel this court to accept findings where the Board accepted part of the evidence and totally disregard other convincing evidence.

> National Labor Relations Board v. Union Pacific Stages, 99 Fed. (2d), 153, supra.

An employer may express an opinion regarding labor matters if it carries no threat of discrimination and does not interfere with attempts of his employees to organize.

National Labor Relations Board v. Clarksberg Publishing Co., 120 Fed. (2d) 976.

The majority of the Board found (Tr. 25) that the petitioner engaged in dilatory tactics during collective bargaining negotiations. Yet the Board dismissed the allegations of the complaint (Tr. 27) that the respondent violated Section 8 (5) of the Act; that is, refusal to bargain. Now, if the petitioner had no obligation under the Act to bargain with the union, how could it be said that it used dilatory tactics during collective bargaining negotiations.

As far as we can determine, the Board finds that utterances of the representatives, as such, were coercive. There certainly is no evidence to show that any utterances made by management's representatives had any effect in discouraging union activities, or made the men fearful of reprisals.

Finally, we have the very recent expression of Mr. Justice Jackson's opinion in *Thomas v. Collins*: (65 Sup. Ct. 315, 330 [1945])

> "Speech of employers otherwise beyond reach of the Federal Government is brought within the Labor Board's power to suppress by associating it with 'coercion' or 'domination' . . . Whether in a particular case the association or characterization is a proven and valid one often is difficult to resolve. If this Court may not or does not in proper cases inquire whether speech or publication is properly condemned by association, its claim to guardianship of free speech and press is but a hollow one."

The conclusion apparently reached by some courts that they are bound by the Board's finding that speech is coercive undoubtedly rests upon the premise that such a finding is one of *fact*. What has been recently written by one learned writer on the distinction between questions of law and questions of fact in administrative proceedings would lead one to conclude that the question of the factors which the administrative agency may consider in applying the statutory norm is a matter of law for the consideration of the courts. (Brown, *Fact and Law in Judicial Review*, 1943, 56 Harv. L. Rev. 899.) Accordingly, even without recourse to the Constitutional argument, it may be urged that the employer is en-

titled to a judicial review of the question whether or not his words, as such, fall within the condemnation of the statute. Since a constitutional privilege is involved, *a fortiori* the employer is entitled to a judicial review.

In connection with the problem we are now considering, an important distinction must be observed. Speech is merely one form of conduct, but it is also a species of conduct specifically protected by the First Amendment. Employer utterances may be involved in a charge of unfair labor practices in two respects. An utterance may be considered by the Board merely as circumstantial or cumulative evidence utilized to characterize other conduct—a "verbal act." (6 Wigmore, Evidence [3d ed. 1940] paragraphs 1772-1792). It would seem to us that freedom of speech would be violated merely by condemning a privileged utterance as an unfair labor practice, and hence, unlawful.

It is submitted that the employer is entitled to judicial review of the Board's finding that his utterances, as such, are coercive, and that the courts are not conclusively bound by the Board's findings in this respect. Even though there may be no decisions of the highest court in the land directly sustaining this view, there is strong language supporting its validity. In the case of St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 52, 56 Sup. Ct. 720, 726 (1936), we find this pertinent statement as to administrative agencies:

> "But to say that their findings of fact may be made conclusively where constitutional rights of liberty and property are involved, although the evidence clearly established that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."
>
> Baltimore & Ohio R. R. Co. v. United States, 298 U. S. 349, 56 Sup. Ct. 797 (1936). Ohio Valley Water Co. v. Ben Avan Borough, 235 U. S. 287, 40 Sup. Ct. 527 (1920); Crowell v. Benson, 285 U. S. 287, 40 Sup. Ct. 285 (1932). Cf. United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644 (1905); Dickinson, Judicial Review of Administrative Determinations

(1941) 25 Minn. L. Rev. 588, 595-599; McGovney, Administrative Decisions and Court Review (1941) 29 Calif. L. Rev. 110.

Even more pertinent language is contained in another Supreme Court decision involving labor's right to free expression:

> "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality . . . And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force."
>
> Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, 293; 61 Sup. Ct. 552, 555 (1941).

As a matter of fact the Supreme Court in upholding the constitutionality of the Wagner Act, in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47, 57 Sup. Ct. 615, 629 (1935); see also *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49, 58 Sup. Ct. 459 (1938), said, specifically, in answer to the charge that in its procedural aspects the Act was unconstitutional, that, upon review of Board orders, "all questions of constitutional right, . . . are open to examination by the court."

CONCLUSION

In conclusion, it is the position of this petitioner that Benton's discharge was not discriminatory in any manner. That the employer was doing only that which he was compelled to do under the Act, that is to terminate any unlawful activities in any manner it saw fit of any employee who was a representative of managament such as Benton. To delve into the basis or reason for such discharge is mere speculation. To permit this would be to encroach upon management's prerogative.

There is no evidence whatsoever which shows that the effect of Benton's discharge was to discourage union membership or in any way interfere with rights of the rank and

file to self-organization; that management's compliance with the law in terminating such unlawful activities, cannot be a basis for inferring that such discharge had the effect as found by the Board. If this was true, then it could be found in every instance where an employer terminates the unlawful activities of a foreman who is encouraging and soliciting union membership.

Certainly to compel this petitioner to reinstate Benton to his former position as management's representative could not be said to effectuate the policy of the National Labor Relations Act. To have Benton as a trustee of the local union and shop steward for the union working for the petitioner as management's representative certainly could not be said to effectuate the policies of the Act.

The history as shown by the record in this case of the petitioner is not one of anti-union or hostility. It has been doing business with a number of unions as the record discloses, and particularly the one in question, why should it all of a sudden attempt to become hostile at Reno, Nevada?

There is no history or pattern of anti-union attitude or hostility toward the union to base a finding on isolated statements, particularly when such statements in and of themselves are not coercive. To do this would violate the right of the employer to free speech as guaranteed by the First Amendment to the Constitution of the United States. We feel that this court may judicially review the evidence with respect to these isolated transactions and is not bound to adhere to the position that if supported by substantial evidence they are conclusive on this court.

Respectfully submitted,

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